

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. S-1471-A

**PETITION OF POWER FUEL, AND TRANSPORT,
REAL ESTATE HOLDING COMPANY (MD), LLC**

OPINION OF THE BOARD

(Opinion Adopted February 21, 2007)
(Effective Date of Opinion: June 14, 2007)

Pursuant to an Order from the Circuit Court for Montgomery County that “this matter is hereby remanded to the Montgomery County Board of Appeals with direction to reevaluate and allow reconsideration of its earlier opinion,” the Board of Appeals convened a hearing on remand in Case No. S-1471-A on December 13, 2006, which was continued to and completed on February 21, 2007. The remanded case involved an application to modify an existing special exception for an automobile filling station and transfer it to the above-captioned Petitioner. The Board, in its May 3, 2006 Opinion, had granted Petitioner’s request in part, and denied Petitioner’s request in part. That Opinion, however, appeared to have been incorrectly based on a finding that the use was a nonconforming use, which it is not, rather than a special exception use.

The hearing on remand was to allow the Board to reconsider three specific aspects of its May 3 Opinion under the relevant special exception analysis (as opposed to a nonconforming use analysis), namely (1) the Board’s denial of the proposed expansion of the “food and beverage” or “convenience” store (condition B and E.9); (2) the Board’s denial of the proposed expansion of operating hours (condition C); and (3) the requirement imposed by the Board that Petitioner must either accept credit cards at the pumps or have an attendant stationed at the pumps to accept cash and make change (condition E.6). A. Shane Kamkari, Esquire, represented the Petitioner at the hearing.

The subject property is located at 501 Olney-Sandy Spring Road, Sandy Spring, Maryland, 20860, in the C-2 Zone.

Decision of the Board: Modifications **Granted**, Subject to Conditions.

EVIDENCE PRESENTED

1. Mr. Kamkari stated that his client, Power Fuel, has complied with most of the conditions set forth in the Board's May 3, 2006 Order, as follows:
 - a. The vacuum and air pump were eliminated.
 - b. The kerosene pump was relocated.
 - c. Landscaping has been installed per the original special exception plan.
 - d. The Planet Aid box, the phone, and the soda machine have been removed.
 - e. No Parking signs have been installed on Bentley Road, and all cars connected with the special exception use have been confined to the premises.
 - f. A pre-existing fence has been approved by the Board.
 - g. A photometric study has been submitted (see Exhibit 69(b)). Only 2/3 of the canopy lights are turned on during operating hours, and only one row of lights is kept on after hours, for security reasons.
 - h. Only light repairs are being done on site—no painting and no body work.
 - i. A new site and landscape plan have been submitted (see Exhibit 69(c)).

He stated that three issues remain:

- a. the Board's denial of the proposed expansion of the "food and beverage" or "convenience" store (condition B and E.9);
 - b. the Board's denial of the proposed expansion of operating hours (condition C); and
 - c. the requirement imposed by the Board that Petitioner must either accept credit cards at the pumps or have an attendant stationed at the pumps to accept cash and make change (condition E.6).
2. Mr. Kamkari stated that his client's use should be reviewed under a special exception analysis, and that the Board should be considering the proposed modifications to see if the use, if modified as proposed, would have any non-inherent adverse effects on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. The Board agreed that this is the correct standard to apply under the Zoning Ordinance.
3. Mr. Kamkari stated that the station is seeking permission to operate between 5 a.m. and 12 a.m., seven days a week. He stated that the special exception currently permits the station to operate from 6 a.m. to 11 p.m. Monday through Friday, and from 8 a.m. to 11 p.m. on Sunday. He stated that the special exception as granted requires that the station be closed on Saturdays. He stated that with respect to Saturday hours, there was testimony at the original hearing from Mr. Garcia (the former special exception holder) indicating that he was a Seventh Day Adventist, and that that was why he was not seeking to have the station open on Saturdays. Mr. Kamkari stated that the restriction on Saturday hours was not imposed because of safety or other concerns. Mr. Kamkari stated that he did not believe that lengthening the hours of operation or having the

station open for business on Saturdays would cause any non-inherent, adverse effect on nearby properties or the neighborhood. He stated that Route 108, on which the station fronts, has been expanded, and that at present there is no traffic buildup in front of the station. He stated that neighbors of the station had testified during the modification hearing that they did not have a problem with the station being open on Saturdays.

4. With respect to the 225 square foot expansion of the store, Mr. Kamkari stated that if the store is viewed as a food and beverage store,¹ it is a permitted use in the C-2 zone. He argued that a convenience store is a lesser included use encompassed by the permitted use of food and beverage store. He stated that if the store is not viewed as a food and beverage store, then it is permissible as an accessory use to the automobile filling station,² because it is incidental and accessory to that business. Mr. Kamkari reiterated that the expansion of the store did not involve any expansion to the perimeter of the building containing the store.

Mr. Kamkari asked that the Board consider the traffic studies which had been excluded by the Hearing Examiner because of a lack of time to review (due to their late submission). He stated that the sole purpose of the traffic study at Exhibit 37(a) (January 2006 revision to a December 2005 study) was to analyze the effect of the addition of 225 square feet to the convenience store on traffic, since the expanded hours at the beginning and end of the day, and on weekends, would have no impact on the traffic during peak hours. He stated that the traffic study concluded that the expanded convenience store would have no impact of traffic. The study indicates that all critical lane volumes are below critical thresholds. See Exhibit 27(a), page 26. Mr. Kamkari argued that the traffic study shows that increasing the square footage of the convenience store does not pose non-inherent adverse effects. Mr. Kamkari also noted that Mr. Hedberg, the author of the traffic study, had testified at the modification hearing that the widening of Route 108 would also help with traffic near the station, and that those improvements have now been made.

Because the Board had had adequate time to consider this traffic study, they voted, on a motion by Member Caryn L. Hines, seconded by member Catherine G. Titus, with Chair Allison I. Fultz and Vice Chair Donna L. Barron in agreement, and Member Wendell M. Holloway necessarily absent, unanimously to accept Exhibit 37(a) as part of the record.

5. Mr. Arshed Mian, the property lease holder and operator, explained photographs, taken December 4, 2006, and December 8, 2006, showing traffic in front of the station. He testified that Exhibit 75(a) was taken on December 4, 2006, at approximately 7 a.m., and that it is an accurate representation of morning traffic. He testified that Exhibit 75(b) was taken on December 8 of the same year, that it

¹ Mr. Kamkari explained that food is prepared and sold on the premises of a food and beverage store.

² The Board Chair made clear that the store was originally allowed as an accessory use to the automobile filling station, and that the Board would continue to treat it as such.

was taken at 2:20 p.m., and that it is an accurate picture, showing the typical volume of cars.

Mr. Mian testified that he took over operation of the station approximately four and a half years ago. He testified that he has not had any problems with people queuing on the street while they wait for gasoline in the last two and a half years, but that it did happen one or two times before that. He stated that the lines were because the station was very competitive in price. He also stated that at the time the lines occurred, the station accepted credit cards at the pump, and that he thought that the convenience of being able to use credit cards (instead of having to pay cash) actually added to the number of people using the station. He also testified that there were lines on a couple of occasions (two and a half or three years ago) when, due to impending severe weather conditions, there were lines of people waiting to fill their vehicles. He testified that the improvements to Route 108 have helped with the queuing at the station.

Mr. Mian testified that the station has less traffic today than when they accepted credit cards, stating that now their gasoline price is the average of the market, not the lowest price. He testified that even if they accepted credit cards now, he did not think there would be lines because their price is not a good.

Mr. Mian testified that the station now takes delivery of gasoline before the morning rush hour, at about 6 a.m., instead of during the busy evening rush hour.

In response to a Board question regarding traffic at the station on weekends, Mr. Mian testified that operations on weekends are much less crowded than during weekday peak hours. He stated that the station is currently open seven days a week from 5 a.m. until 11 p.m., but noted that the station usually does not open until 5:30 a.m. He stated that the Circuit Court had specifically stayed that aspect of the Board's decision which required the station to be closed on Saturdays and to revert to the hours approved in the special exception.

In response to a Board question, Mr. Mian testified that a one hour expansion of hours does represent a substantial benefit in terms of revenue, stating that the station sells diesel in addition to gasoline, and that they have arrangements with some companies to fill their diesel trucks early in the morning or late at night.

6. Ms. Robin Ziek, of Yardley Road, testified in her personal capacity that from 7:10 a.m. to 7:30 a.m., traffic is heavier in front of the station because of Sherwood High School. She testified that Exhibit 75(c), taken December 4, 2006, at 7:26 a.m., shows Route 108 at Bentley Road. She testified that Exhibit 75(d), taken that same day at 7:27 a.m., and that Route 108 is on the left edge of this photo, which was taken from Bentley Road. She testified that most traffic enters the station from Bentley Road, and exits onto Route 108.

She testified that the Bentley Road Civic Association had spent lots of time on this matter. She stated that her concern was the increased traffic at the corner of Bentley Road and Route 108. She testified that it is hard to exit Bentley Road, but

stated that she was not saying that this was the fault of the filling station. She stated that she drives her daughter to Sherwood High School every day because cars on Route 108 will not stop for her to cross the street. She testified that the middle turn lane on Route 108 has made things easier because you can now go halfway across.

She stated that she was concerned that if the filling station became too much of a draw, it would be dangerous. She testified that the Master Plan speaks of Sandy Spring as a village. She testified that when the station's gasoline prices were low, they drew huge crowds. She testified that when the station is not the lowest price, that their not accepting credit cards actually cuts down on traffic. She testified that presently, the station has a middle, average price, and that it's working. She asked if the Board could put a condition in the special exception requiring that the special exception holder not have the lowest price gasoline.

Regarding the convenience store, Ms. Ziek testified that if the store is seen strictly as a convenience for people buying gas, she thought that was acceptable. She testified that if the station advertises their convenience store as a 7-11-type operation, that would draw larger crowds and pose a problem. She stated that she did not have a problem with the addition of 225 square feet.

Regarding the hours of operation, Ms. Ziek testified that in her opinion, the 6 a.m. to 11 p.m. hours were already too much given that Sandy Spring is a rural, family village. She testified that she thought that keeping the station open the additional hour at night (until midnight) was not necessary. She testified that the Saturday hours have never been a problem.

Ms. Ziek testified that the Bentley Road community supported Mr. Garcia, and that the new lessee (presumably Mr. Mian/PowerFuel) has been lovely. She testified that the station's gardens are beautiful and well-kept. She testified that the steps they have taken, such as prohibiting parking on the side streets and lowering the lighting, have improved her community. She stated that she wanted that appreciated and recognized.

DECISION OF THE BOARD

The Board of Appeals considered the testimony and evidence presented at the above-referenced hearing, along with the representations and arguments of counsel. After careful consideration of the above, and review of the record in the case, the Board concludes that while the modifications set forth below will alter the terms and conditions of the original grant, they will not substantially change the nature, character, or intensity of the special exception use, and that the use as modified below will not have any non-inherent adverse effects on nearby properties and the general neighborhood. Therefore:

- a. On a motion by Member Catherine G. Titus, seconded by Vice Chair Donna L. Barron, with Chair Allison I. Fultz and Member Caryn L. Hines in agreement, and Member Wendell M. Holloway necessarily absent, the Board voted 4-0 to adopt Exhibit 69(c) as the site and landscaping plan of record;

- b. On a motion by Member Catherine G. Titus, seconded by Member Caryn L. Hines, with Vice Chair Donna L. Barron and Chair Allison I. Fultz in agreement, and Member Wendell M. Holloway necessarily absent, the Board voted 4-0 to amend conditions B and E.9 of the Board's May 3, 2006, Opinion to approve the expansion of the accessory convenience store ("food and beverage store," "convenience store," "food mart area").
- c. On a motion by Vice Chair Donna L. Barron, seconded by Member Catherine G. Titus, with Chair Allison I. Fultz and Member Caryn L. Hines in agreement, and Member Wendell M. Holloway necessarily absent, the Board voted 4-0 to grant an expansion of the operating hours for the filling station, such that it may now be operated from 5:00 a.m. to 11:00 p.m., 7 days a week. The Board declined to allow operation until midnight, citing the Master Plan designation of Sandy Spring as a rural village as the reason for precluding the requested late night hours.
- d. On a motion by Member Catherine G. Titus, seconded by Member Caryn L. Hines, with Chair Allison I. Fultz and Vice Chair Donna L. Barron in agreement, and Member Wendell M. Holloway necessarily absent, the Board voted 4-0 to strike condition E.6 to eliminate the requirement that Petitioner either accept credit cards or station an attendant at the pumps by striking the second, third, and fourth sentences of that condition, and inserting in lieu thereof, "Petitioner must take appropriate measures as needed to prevent queuing onto the public streets."

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the request to modify the special exception as stated above is granted; and

BE IT FURTHER RESOLVED by the Board of Appeals for Montgomery County, Maryland that all terms and conditions of the original special exception, together with any modifications granted by the Board, except as expressly changed by this Resolution, remain in effect; and

BE IT FURTHER RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 14th day of June, 2007.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.